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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAIGUT S.A. de C.V., a Mexican corporation; and SAIPEM S.A., a French corporation,

Plaintiffs,

v.

SEMPRA ENERGY, a California corporation; SEMPRA LNG, a Delaware corporation; ENERGIA COSTA AZUL, S. de R.L. de C.V., a Mexican corporation; BVT LNG COSTA AZUL, S. de R.L. de C.V., a Mexican corporation; COSTA AZUL BMVT, S.A. de C.V., a Mexican corporation; BLACK & VEATCH CORPORATION , a Delaware corporation; TECHINT S.A. de C.V., a Mexican corporation; THE KLEINFELDER GROUP, INC., a California corporation; ARUP NORTH AMERICA LIMITED, a United Kingdom corporation; ARUP TEXAS, INC., a Texas corporation; WHESSOE OIL & GAS LIMITED, a United Kingdom corporation; Q & S ENGINEERING, INC., a California corporation; and DOES 1 through 20, inclusive

Defendants.

No. 08 CV 0478 JM BLM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION TO EXTEND THE TIME FOR DEFENDANT BLACK & VEATCH CORPORATION TO RESPOND TO THE COMPLAINT BASED ON THE COURT'S APRIL 9, 2008 ORDER TO SHOW CAUSE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As the Court correctly noted in its April 9, 2008 Order to Show Cause Why Complaint Should Not Be Dismissed for Lack of Subject Matter Jurisdiction ("OSC"),[1] "as alleged, this is an action between citizens of a foreign state and citizens of other foreign states and United States citizens." It is Black & Veatch's position that plaintiffs can neither explain away nor cure the jurisdictional defects which appear on the face of the Complaint. Black & Veatch therefore shares the Court's apparent desire to see the jurisdictional issue fully briefed and decided before the parties spend additional time and money litigating in this forum.

Black & Veatch submits that its current deadline to respond to the Complaint, May 8, guarantees that it will have to begin to prepare its Rule 12 motion[2] before the OSC is decided.[3] Black & Veatch therefore requests that its deadline to respond to the Complaint be extended until three weeks after the Court rules on the OSC to avoid the expense of preparing potentially unnecessary briefing while awaiting the Court's ruling on the OSC. Good cause, specifically the conservation of parties' resources and judicial economy, supports this request and Black & Veatch has met and conferred with all parties who have appeared in the action in an unsuccessful effort to secure a stipulation.

II. THE COURT SHOULD DETERMINE ITS JURISDICTION OVER THIS MATTER BEFORE THE PARTIES OR THE COURT COMMIT RESOURCES TO LITIGATING IT.

Jurisdictional challenges should be resolved early in a case, before the parties and the Court expend time and money litigating in a forum which lacks jurisdiction. *See O'Hare Intern. Bank v.*

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[1] A copy of the OSC is attached as Exhibit A to the concurrently-filed Declaration of Richard Elder.

[2] Black & Veatch does not speak for Sempra Energy or Sempra LNG and is uncertain of their intentions but the fact that the Sempra entities sought an extension of time in which to respond to the Complaint suggests that, like Black & Veatch, they plan to file Rule 12 motions. If this is correct, an extension of defendants' time to respond will prevent the needless preparation of ***three*** motions (one by Black & Veatch, one by Sempra Energy and one by Sempra LNG).

[3] Defendants' briefing regarding the OSC is not due until May 2. It is therefore unlikely that the OSC will be decided by May 8 and impossible that the OSC will be decided before Black & Veatch begins to prepare its motion.

Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971); *See also* 27A Fed. Proc., L. Ed. § 62:396 ["The emphasis of FRCP 12(d) is in directing the hearing of the defenses specified therein prior to trial. By targeting early resolution of threshold issues, FRCP 12(d) can be an excellent device for conserving time, expense, and scarce judicial resources . . ."]

The Court's OSC is based on the Court's observation that the face of the Complaint demonstrates an apparent absence of diversity of citizenship.[4] Specifically, the Complaint alleges that plaintiffs SaiGut and Saipem are both alien corporations[5] and plaintiffs have named as defendants no less than six corporations ***which plaintiffs affirmatively allege*** are incorporated in and/or have principal places of business in foreign countries:

- Energia Costa Azul, S. de R.L. de C.V., (Mexico) (Complaint at ¶5);
- Costa Azul BMVT, S.A. de C.V. (Mexico) (Complaint at ¶6);
- Techint S.A. de C.V. (Mexico) (Complaint at ¶8);
- BVT LNG Costa Azul, S. de R.L. de C.V. (Mexico) (Complaint at ¶9);
- Arup North America Limited (United Kingdom) (Complaint at ¶11); and
- Whessoe Oil & Gas Limited (United Kingdom) (Complaint at ¶12).

The presence of even a single defendant with ***either*** a principal place of business ***or*** a place of incorporation outside the United States is sufficient to destroy diversity. *Faysound Limited v. United Coconut Chemicals, Inc.*, 878 F.2d 290 (9th Cir. 1989) ["Where an alien is made co-defendant with a citizen-defendant by an alien plaintiff, [*Cheng v. Boeing*, 708 F.2d 1406, 1412 (9th Cir. 1983)] is dispositive: there is no jurisdiction over the alien. If the alien defendant is indispensable, *Boeing* clearly implies, there is no jurisdiction at all."] Plaintiffs have stated that they believe that diversity jurisdiction exists because they have alleged that some of the foreign defendants are the alter ego of some domestic defendants. (Exhibit B to Elder Decl.) This

[4] Even if plaintiffs could ***allege*** that diversity exists, the Court should dismiss the action unless plaintiffs can also ***prove*** it. *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 685 (7th Cir. 1998).

[5] Paragraph 1 of the Complaint alleges that "SaiGut S.A. de C.V. ("SaiGut") is a corporation formed under Mexican law with its business in Ensenada, Baja California, Mexico." Paragraph 2 alleges that "Saipem S.A. ("Saipem") is a corporation formed under French law, with offices in Saint Quentin-en-Yvelines, France."

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argument is incorrect for at least three reasons: (i) Black & Veatch is not the alter ego of any defendant; (ii) even accurate alter ego allegations (which plaintiffs' are not) do not support diversity jurisdiction; and (iii) even if the citizenship of a parent could be imputed to the subsidiary, the citizenship of one alleged stockholder in a company cannot be imputed to another alleged stockholder. However, for the time being the Court need not consider any of these defects. It is sufficient to note – as the Court apparently has – that the parties are unquestionably not diverse because plaintiffs allege that Whessoe is a foreign corporation[6] and they do not allege that Whessoe is the alter ego of any other defendant. At a bare minimum, there is a very substantial controversy over whether diversity jurisdiction exists in this case – an issue that will be fully briefed through the parties' responses to the OSC, and decided by the Court thereafter.

III. THE CURRENT DEADLINE FOR BLACK & VEATCH'S RULE 12 MOTION GUARANTEES THAT THE PARTIES WILL BE FORCED TO WASTE MONEY BRIEFING CHALLENGES TO A COMPLAINT OVER WHICH THE COURT LACKS JURISDICTION.

Black & Veatch's Rule 12 motion is currently due on May 8, 2008 and, as discussed above, there is little question that the Court will dismiss the Complaint as it is currently pled. Even if plaintiffs were to receive leave to amend, Rule 12 motions based on the current Complaint would have to be rewritten and re-filed to challenge any amended complaint.

Thus, if the deadline for Black & Veatch's Rule 12 motion remains May 8, there is no question that Black & Veatch will be forced to expend substantial time and money briefing a Rule 12 motion in a case over which the Court lacks subject matter jurisdiction. In order to file a Rule 12 motion on May 8, Black & Veatch will have to begin preparing its brief in late April. The OSC will not be fully briefed until Friday, May 2 so, even if the Court were to rule on the OSC the court day after it is fully briefed (May 5) Black & Veatch would have already been forced to spend substantial time and money preparing its Rule 12 motion.

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[6] Paragraph 12 alleges that "Whessoe Oil & Gas Limited ("Whessoe") is a corporation formed under United Kingdom law, with offices at Princes Gate, London, U.K."

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In the more likely scenario that the Court holds the matter under consideration for four or more court days, defendants would be forced to ***complete and file*** their Rule 12 motions before receiving a ruling on the jurisdictional Order to Show Cause. In fact, given the Court's caseload, the matter might remain under submission until May 23, when plaintiffs' oppositions to defendants' Rule 12 motions would be due.[7] Thus, there is a good possibility that plaintiffs will also be forced to waste time and money preparing their oppositions to Rule 12 motions before the Court rules on the OSC.

IV. BLACK & VEATCH HAS MET AND CONFERRED IN AN ATTEMPT TO SECURE A STIPULATION.

Counsel for Black & Veatch has conferred with counsel for the other three defendants who have appeared in this matter, Sempra Energy, Sempra LNG and Kleinfelder Group. (Elder Decl. at ¶ 4.) All three parties agree with Black & Veatch that an extension is advisable.[8] (*Id.*) Counsel for Black & Veatch also met and conferred with plaintiffs' counsel regarding the possibility of a stipulated extension over the telephone on April 10 and in writing on April 10 and April 11. (Elder Decl. at ¶ 5, Exhibit C to Elder Decl.) Plaintiffs' counsel did not express any definite opposition to an extension but stated that he was "not prepared to take a position" on the issue. (Ex. C to Elder Decl.) Plaintiffs' counsel also stated that there is "not yet a great urgency" (*id.*) which is curious since even now, Black & Veatch cannot seek additional time by a motion on statutory time before the May 8 deadline for Black & Veatch's Rule 12 motion.

V. CONCLUSION

Good cause supports an extension of Black & Veatch's time to respond to the Complaint. Black & Veatch respectfully requests that the Court continue Black & Veatch's deadline to respond until 21 days after a ruling on the OSC.

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[7] Motions filed on May 8 would be noticed for hearing on June 9. Oppositions would be due May 23 (May 26 is a holiday and Local Rule 7.1(e)(2) requires oppositions "not later than 14 calendar days prior to the noticed hearing").

[8] The issue is less relevant to Kleinfelder because Kleinfelder has already answered. Counsel for Kleinfelder nonetheless agreed to the proposed extension. (*See* Elder Decl. at ¶4.)

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DATED: April 15, 2008

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